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JAMES H. McKENNEY,

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1904.

No. 189.

THE FIRST NATIONAL BANK OF CHICAGO, H. W. ROGERS and JAMES C. ROGERS, as H. W. ROGERS & BROTHER, *Petitioners,*

vs.

THE CHICAGO TITLE & TRUST COMPANY, Trustee of ALEXANDER RODGERS, BANKRUPT, THE NATIONAL STORAGE COMPANY, JAMES A. PATTEN, FRANK E. WINANS, and E. W. BAILEY & COMPANY, *Respondents.*

Certiorari.

Brief of Reed, Smith, Shaw & Beal for Respondents.

JAMES H. REED,
JAMES H. BEAL,
of Counsel for Respondents, the Chicago Title & Trust Company, Trustee, and James A. Patten.

JOSEPH E. PADEN,
NEWTON WYETH,
REED, SMITH, SHAW & BEAL,
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SHAW BROS., PITTSBURGH, PA.

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Brief of Reed, Smith, Shaw & Beal for Respondents.

This brief is supplemental to the Brief and Argument heretofore filed for the Respondents. It is presented because of the importance of the questions involved, not only in this case, but in other litigation pending before the courts of the United States, and it is intended to emphasize, and to some extent elaborate, the arguments upon these propositions, and in the following order:

FIRST. The District Court had jurisdiction.

SECOND. The case was properly heard and disposed of as an appeal in the Circuit Court of Appeals; and in any event, the Petitioners, having raised no objection to the form in which the case was heard by the Circuit Court of Appeals, cannot now question the right of that court so to hear and dispose of the case.

THIRD. The warehouse receipts held by the Petitioners were invalid, and no title to the property in controversy passed by the endorsement thereof.

FOURTH. The warehouse receipts being invalid, and neither the Storage Company nor the Petitioners being in actual possession of the property, there was no valid pledge.

FIFTH. Under the Bankruptcy Act the Petitioners, as against the Trustee, have no claim to, or lien upon, the property purporting to be covered by the warehouse receipts.

I.

THE DISTRICT COURT HAD JURISDICTION.

(a) The Trustee was in the actual possession of the property, the title and right of possession to which the Petitioners claimed was in them, and it acquired that possession from the bankrupt peaceably and without fraud. Therefore, any party asserting an adverse title to the property, thus actually in the possession of the Court, was required to come into the Court having that possession to assert his claim; and cases where the possession was in a third party, under claim of adverse title, have no application.

(b) The Petitioners, upon the coming in of the report of the Referee carrying a recommendation favorable to them, *consented* to an order directing the sale of the property and substituting therefor the proceeds of such sale; and this sale was to be made by the Bank, one of the Petitioners. (Record 55.)

The Bank made sales of the property, reported the same to the Court, and in each case stated that "it *holds subject to*

the order of this court" the proceeds of such sale. (Record 57 and 61.)

(c) Having so declared and admitted that the proceeds were held subject to the order of the District Court, the present Petitioners presented petitions to that court setting up their claims of title to, or lien upon, the property so sold, and prayed the decree of that court awarding to them the proceeds of such sales.

Upon such a record certainly it is not now open to the Petitioners to deny the jurisdiction of the District Court to make the very decree that the Petitioners asked it to make.

II.

THE CASE WAS PROPERLY HEARD AND DISPOSED OF IN THE CIRCUIT COURT OF APPEALS, AS AN APPEAL; AND IN ANY EVENT, THE PETITIONERS, HAVING RAISED NO OBJECTION TO THE FORM IN WHICH THE CASE WAS HEARD BY THE CIRCUIT COURT OF APPEALS, CANNOT NOW QUESTION THE RIGHT OF THAT COURT SO TO HEAR AND DISPOSE OF THE CASE.

The proceeding started in the District Court by a petition from the Receiver (no Trustee having then been appointed) setting forth its possession of the property in question, the necessity of a prompt sale thereof, and praying a decree authorizing such sale. (Record 5, 6.) To this petition an answer was filed by the Bank, denying the jurisdiction of the court on the ground that "it holds in pledge to secure indebtedness owing to it by the bankrupt, warehouse receipts", specifying them and the property covered thereby, and setting up title to the seed by the transfer of these ware-

house receipts, and alleging also that they were in possession of the property. Rogers & Brother filed a similar answer, and the National Storage Company filed an answer claiming the possession of the property. Replies were filed denying the contentions set up in these answers. The matter was referred to the Referee, and on August 5, 1901, he filed his report recommending that the petition be dismissed (1) because the court was without jurisdiction, and (2) that the warehouse receipts were valid. On the same day the court sustained objections filed by the Receiver and creditors to the Referee's report on the question of jurisdiction, and entered a decree "that the said Receiver received and took possession from the Bankrupt peaceably the property in question, * * * and that the court had jurisdiction and possession of said property in this cause"; and without making any further order on the report of the Referee, and, by consent and "on the stipulation of Orville Peckham, Attorney of the First National Bank in open court that the said Bank will sell and hold the funds derived from the sale of said seed *subject to the order of the court herein*," it was further ordered that the seed, purporting to be covered by said warehouse receipts, be sold.

After making sale of the seed and reporting the same to the court, the First National Bank presented its petition (Record, 67-79) setting forth its title to the property, the sale thereof under the above order, the indebtedness due it, and praying an order that its claim be allowed and satisfied and paid out of the moneys held by it. Rogers & Brother filed a like petition (Record, 80). To these new petitions answers were filed denying the title and lien set up by the Petitioners. The National Storage Company also filed its petition setting up a claim for storage charges, partly as against the Bankrupt and partly as against the Trustee, and claiming payment therefor out of said funds upon the ground that possession of the property sold was in it, and that the

title thereto passed under its receipts, to which petition answers were duly filed.

On October 11, 1901, the District Court made an order consolidating all of the foregoing petitions, together with the answers thereto, and referred the case back to the Referee to take additional proofs, and report the same to the court "upon the said evidence and the evidence heretofore taken by the said Referee so far as the same shall be material."

Further proofs were taken, and on October 29, 1902, the Court made its final decree (Record, 114 and 115) holding that the right of possession of the property in dispute was in the Storage Company, that it had the possession of such property, and affirming the validity of the warehouse receipts.

From this brief statement of the pleadings and the nature of the proceedings, it is, we think, clearly apparent that the matter heard and disposed of in the District Court, was one as to which a right of *appeal* existed.

(1) *It was a separable controversey.*

The controversey was as to the title to and possession of property claimed by the present Respondents to form a part of the bankrupt estate. The object and purpose of the present Petitioners, by their answers to the original petition, was to recover from the estate this specific property. These answers in reality were intervening petitions for that purpose, and were so treated by the parties and by the Court. The Court had jurisdiction, as we have already said, because (a) it had the actual physical possession of the property, and (b) the Petitioners waived their original objection to the jurisdiction, and in the most explicit manner con-

sented to the Court hearing and disposing of the case. Section 23-b of the Bankruptcy Act confers jurisdiction where there is such consent.

In *Hewitt vs. Berlin Machine Works,* 194 U. S., 296, the Berlin Machine Works had filed a petition in the District Court claiming certain machines in the possession of the Trustee of the bankrupt, upon the ground that they had been sold upon conditional sales, valid under the laws of New York as against all creditors. From the decree of the District Court on this petition there was an *appeal* to the Circuit Court of Appeals, and from the decree of that court an appeal was taken to this court. In sustaining the right of appeal to the Circuit Court of Appeals, Mr. Chief Justice Fuller stated the rule applicable to such cases, thus:

> "If the trustee had carried the case to the circuit court of appeals on petition for supervision and revision under Section 24-b of the bankruptcy law (30 Stat. at L. 553, chap. 541, U. S. Comp. Stat. 1901, p. 3432), the case would have fallen within *Holden vs. Stratton,* 191 U. S. 115, *ante,* 116, 24 Sup. Ct. Rep. 45, and the appeal to this court would have failed. But he took it there by appeal, though accompanied by some apparent effort to avail himself also of the other method. And as the Berlin Machine Works asserted *title to the property in the possession of the trustee by an intervention raising a distinct and separable issue,* the controversey may be treated as one of those 'controversies arising in bankruptcy proceedings,' over which the circuit court of appeals could, under Section 24-a, exercise appellate jurisdiction as in other cases. Section 25-a relates to appeals from judgments in certain enumerated steps in bankruptcy proceedings, in respect of which special provision therefor was required (Holden vs Stratton, 191 U. S. 115, *ante,* 116, 24 Sup. Ct. Rep. 45), while Section 24-a relates to controversies arising in bankruptcy proceedings in the exercise by the bankruptcy courts of the jurisdiction vested in them at law and in equity by Section 2, to settle the estates of bankrupts, and to deter-

mine controversies in relation thereto. *Hutchinson vs. Otis*, 190 U. S. 552, 47 L. ed. 1179, 23 Sup. Ct. Rep. 778; *Burleigh vs. Foreman*, 125 Fed. 217.

The appeal to this court then followed under Section 6 of the act of March 3, 1891."

In the case *In re Jacobs*, 99 Fed., 539, the Circuit Court of Appeals for the Eighth Circuit have held that the power of revision conferred by the Bankruptcy Act does not extend to proceedings in the District Court against third parties to protect assets of the estate, or suits or proceedings instituted by third parties against the Trustee in that court, and that such proceedings must be reviewed in the ordinary way by appeal or writ of error, when the controversey has reached a final decree in the court of first instance.

In *Plymouth Cordage Company vs. Smith*, 194 U. S., 311, Mr. Chief Justice Fuller, after quoting the provisions of the Bankruptcy Act, says:

> "The Bankruptcy Act clearly distinguishes between 'controversies arising in bankruptcy proceedings' and 'bankruptcy proceedings' proper, and between supervisory jurisdiction in a summary way in matter of law, and jurisdiction by appeal or writ of error. Appellate jurisdiction over controversies, as in other cases, is vested by Section 24-a, and over certain designated bankruptcy proceedings by Section 25-a, by appeal, as in equity cases, bringing up both law and fact."

That the present proceeding falls exactly within the language of Mr. Chief Justice Fuller in the Hewitt case as being "an intervention raising a distinct and separable issue," and "may be treated as one of those controversies arising in bankruptcy proceedings over which the Circuit Court of Appeals could, under Section 24-a, exercise appellate jurisdiction as in other cases," is more plainly manifest from these two further suggestions:

(a) The original objection made by the present Petitioners to the jurisdiction of the District Court, was upon the ground that the thing sought to be litigated must be made the subject of an independent suit in the State courts, and

(b) The Petitioners' counsel, on page 24 of his brief, suggests that the District Court should perhaps have made its decree without prejudice to the right of the Respondents to litigate with Petitioners in the State Court.

Both of these positions emphasize the correctness of our statement that the thing litigated could have made the subject of an independent suit, and therefore, constituted a separable controversey, and in the language of this Court in the *Hewitt case* could properly be treated as appealable.

(2) *As the Court of Appeals had jurisdiction over the subject-matter, and the objection now made relates only to the form in which the power of the court should be exercised, the Petitioners having made no objection to the Circuit Court of Appeals hearing and determining the case as an appeal, are now estopped from making such objection.*

It is of course conceded that the Circuit Court of Appeals had jurisdiction over the subject-matter—that is, the final decree of the District Court—brought before it by the appeal. The objection relates only to the form or procedure by which that jurisdiction should be exercised. The mode of procedure may in some cases affect or limit the extent of the jurisdiction of the court, yet the court having jurisdiction over the subject-matter, it could, with the consent or by the acquiescence of the Petitioners, hear and determine

the case; and the Petitioners having taken their chances of a favorable decision, should not now be permitted to make an objection which, to have been timely should have been presented to the Circuit Court of Appeals.

It has been held by the Circuit Court of Appeals for the Fourth Circuit, in *Chesapeake Shoe Company vs. Seldner,* 122 Fed. 593, that the court may, under proper circumstances, and against the objection of the respondent, hear an appeal as a petition for revision, and dispose of the case accordingly.

In the present case, observe that the jurisdiction actually exercised by the Court of Appeals was no more than it could have exercised upon a petition for revision. True the District Court in its final decree held that the Storage Company had possession of the property, but the language of the decree must be read in connection with the decree of August 5, 1901, in which the court decreed that "the Receiver had acquired and held peaceable possession of the property." The language of the decree was not a finding of fact in this respect, but a conclusion of law deduced from facts, not specifically found by the court.

It will be observed further that Petitioners' counsel does not challenge the correctness of a single statement of fact made by the Circuit Court of Appeals and upon which it founds its decree; and it will also be observed that all, or practically all of these facts, are found by the Referee.

(3) *It should not pass unnoticed that, even if the Petitioners' claim be restricted to a claim of lien or priority, the word "claim" in Clause 3 of Section 25-a is broad enough to authorize an appeal in such case.*

We call attention to this, not because we think it necessary to a decision of the case, but because the question is one of such importance that it would not be fair to the court not to present it in case the court should deem it advisable to consider and dispose of it in the present case.

The words of the Act are:

> "That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, * * * (3) from a judgment allowing or rejecting a debt or *claim* of *five hundred dollars or over.*"

As effect is to be given to each word of the Act, so far as possible, it must be taken that the word "claim" was not used as synonymous with "debt".

The word "claim" in its natural and ordinary acceptation, is broad enough fairly to include a claim of priority or lien. To hold that no appeal exists in such case would produce this anomalous result, that in case of dispute as to the *amount* of a debt of $500, the Trustee may appeal and obtain the judgment of the Circuit Court of Appeals upon both the facts and the law, and in that case the debt, as finally adjudicated, will share *only* pro rata with the other creditors; but if the claim be of priority or lien, for an amount, as here, which wipes out the entire assets of the estate, the Trustee can have no appeal, and is limited to a revision in matters of law. Of course, if Congress has so enacted, the law must be obeyed. But certainly every intentment is against a construction of the Act producing such a result. The manifest purpose of giving to the Trustee a right to appeal from a judgment or decree fixing the amount to be paid out

of the estate upon any debt or claim, was to protect the creditors in the distribution of the assets of the estate; and in order to effectuate such a division, it certainly seems to us necessary that the word "claim'" should be so construed that the right of appeal as to a claim of priority, should be co-extensive with the right of appeal in the case of a decree fixing the *amount* of the claim. Of course, in every bankruptcy case the assets are not sufficient to pay all creditors in full; otherwise there would be no bankruptcy. The most important questions that arise in bankruptcy are, ordinarily those concerning liens and priority, and certainly Congress never intended that as to them no right of appeal should exist.

The use of the word "judgment" in this connection makes no difference, because the same word is used in describing the decree adjudging, or refusing to adjudge, the defendant a bankrupt, and also in describing the order made granting or denying a discharge.

We are not unmindful of the language used by this court in *Hutchinson vs. Otis,* 190 U. S., 552, but in that case the court is explicit in stating that the question is disposed of summarily because the case had been very satisfactorily decided on the merits by the Circuit Court of Appeals upon a petition for revision.

III.

THE WAREHOUSE RECEIPTS WERE INVALID, AND THE ENDORSEMENT THEREOF TO THE PETITIONERS DID NOT VEST IN THEM ANY TITLE TO THE PROPERTY PURPORTING TE BE COVERED BY SUCH RECEIPTS.

The National Storage Company is an Illinois corporation, and by its charter is authorized to carry on a general ware-

house business, to receive for *safe keeping* or *storage*, general merchandise, etc., and to issue receipts or certificates for goods or personal property to the owner or owners thereof when received by the Storage Company.

On August 25, 1900, the Storage Company made a written proposition to the Bankrupt, which was accepted by him, and this proposition contained the following significant language:

> "1. The National Storage Company hereby proposes *to issue its storage warrants to the order of yourself* or to such order as the acceptor hereof may hereafter direct, upon personal property consisting in part of Field Seeds *to be stored in the premises known as No. 220-230* Johnson Street, Chicago, Illinois. * * *
>
> 3. Rates, Terms and Conditions which shall govern the storage of property or issue warrants under this proposal are as follows:
>
> On property valued at $10,000 or less, the charge for the first calendar month or fraction will be $7.50, for each succeeding month or fraction $7.50, and for each additional $1,000 or fraction, the rate will be $.75 per month.
>
> All traveling expenses and other incidental expenditures incurred while conducting the business under this proposal, and all costs of placing property in store, such as measuring, weighing, tallying, surveying, platting or drafting, etc., will be added to above charges. A certified memorandum must be rendered, showing market value of the property placed in store on which storage charges are to be based.
>
> 4. *Substantial* fences, gates, partitions, doors or other forms of enclosure, for enclosing or protecting property, for which warrants of this Company have been or may hereafter be issued, *shall be constructed* and kept in repair by acceptor hereof, and if not so constructed or repaired upon request, this Company is hereby authorized to forthwith construct or repair same, and place

any cost therefor as a charge against the property enclosed or protected thereby."

At this time the Bankrupt held under lease and occupied in carrying on his business as a wholesale seed merchant, six stories and basement of the building, No. 220 to 230 Johnson Street, Chicago, and on August 31, 1900, he executed and delivered to the Storage Company a lease for the entire premises covered by his lease, for a term of three years, "and so long thereafter as property remains thereon for which warrants of said Storage Company *have been issued* and *are in force and effect,*" the rental being one dollar and other good and valuable considerations, and this lease contained the following condition:

> "That the said leased premises shall be *used and occupied exclusively* for the storage of personal property, and for the transaction of such other business as may be connected therewith, or incident thereto, in pursuit of any rights claimed in performance of duties of said Storage Company as Warehousemen."

Thereafter the Warehouse Company issued to the Bankrupt, warehouse receipts or warrants to his order for property located upon these premises. These warrants contained a provision releasing the company from the responsibility for any loss or damage to the property. The warrants were used by the Bankrupt as collateral for loans, there being about twenty such warrants outstanding at the date of the bankruptcy.

The facts are thus stated by Judge Jenkins in his statement of facts in the Circuit Court of Appeals:

> "The Storage Company had no warehouse of its own, only such as was leased, as was the one in question here. It had no keys to this building. The bankrupt alone had the keys, and access thereto was obtainable only through him. The signs placed upon the walls of the building were obscured and not readily

observable by reason of the fact that the piles of seed were higher than the signs. After the lease, he continued as before to carry on his ordinary business upon the premises, maintaining an office with sundry clerks and workmen upon the premises. He bought and shipped seed, cleaned the same, and occasionally cleaned seed on which receipts were issued, taking it out of the bags, cleaning it and restoring and adding a sufficient amount of other seed to equalize the loss in the cleaning. Also, in some instances, the Bankrupt shipped out the property before the receipts were cancelled; but the Storage Company did not know of it. The Bankrupt, also, from time to time, as the exigencies of his business prompted, brought seed to the warehouse and substituted it for seed on which receipts had been issued, removing the seed on which receipts had been issued and replacing the tags on the bags substituted. This was done *in many instances,* and sometimes *several times* with the property covered by one receipt. Whether the Storage Company knew of this custom of business is left somewhat doubtful by the evidence. The Storage Company, however, had notice of the custom of the Bankrupt to clean the seed so placed in storage. The inspector of the Storage Company called at the premises from one to five times a week. Once or twice a week he would check over the goods stored and see that the tags were on the bags and that the stock was all right."

And in his opinion he further says:

"We are to ascertain the real intention of the contracting parties from the whole agreement, read in the light of the surrounding circumstances. The Bankrupt was largely engaged in purchasing seed upon credit, storing the property purchased in his warehouse. He occupied the premises as a place of business, maintaining an office there, with clerks to assist in the management of the business, and with porters to handle the seed. The premises were subject to a rental of $250 a month. He arranged with the Storage Company, which had no warehouse of its own, that it would issue

warehouse warrants or receipts to the Bankrupt for property upon the Bankrupt's premises, for a certain small charge per month upon the value of the property covered by the receipts. He executed a lease of the premises to the Storage Company, to continue so long as the Bankrupt should desire and so long as property remained thereon for which warrants or receipts had been issued; and this without any payment of rent by the Storage Company, the rental in fact being paid by the Bankrupt. The Storage Company neither required, nor was it given, any key to the premises. The Bankrupt remained in possession of the premises as before the agreement, continuing to transact his business there as he had formerly done. There were certain signs placed upon the different floors of the building, indicating that the Storage Company controlled the premises. These were small and obscure signs, not likely to attract attention, and most of them hidden behind the piles of bags of seed. No sign was displayed upon the exterior of the building indicating any proprietorship of the Storage Company, or giving notice to the world that any other than the Bankrupt had possession and control. There was no open, notorious manifestation of a change of possession, none was intended, and there was none in fact. Upon each pile of bags of seed for which the warehouse receipts or warrants were issued, there was placed a small tag, which might be discovered upon careful search. The Bankrupt substantially treated this property as his own; at times going through the forms prescribed by the Storage Company; and whenever he found it necessary, ignoring them. We do not find that the Storage Company had knowledge of this action of the Bankrupt; but it certainly knew that it was possible under the circumstances for the Bankrupt to do with the property as he would, since it was left within his control.

"It is difficult for us to look upon this transaction as a warehousing of property. The Storage Company assumed no liability to the Bankrupt, and assumed only such responsibility as the law imposes upon it with respect to those advancing money upon the faith of its

warehouse warrants or receipts. The name of the company is in itself, under the circumstances, a false pretense. It did not store property. It had no premises upon which to store property. The Bankrupt stored the property. The Bankrupt paid the rental of the premises. It is true that an agent of the Storage Company occasionally visited the premises and inspected the property in a sort of way, but exercised no supervision or control that would prevent the Bankrupt from doing with it as his will might dictate, or his financial necessities might require. We cannot but regard this arrangement as a subterfuge, a mere device to enable the Bankrupt to hypothecate the warehouse warrants or receipts, and so to raise money upon secret liens upon property in his possession and under his control. The written agreement indicates this. It is somewhat startling to learn that a warehouse company should store goods of this character for another upon the premises of that other, taking compensation as for storage, not related to the cost of storage, or to the expense of receiving and delivering the property, not according to the space occupied by the property, but according to the value of the property. The fact here is patent that the Storage Company assumed to the Bankrupt no liability, and that the sole purpose was to issue warehouse warrants or receipts, making such inspection, only, as in its judgment would protect it from liability to third persons by reason of the issue of its warrants. To uphold such a scheme would permit every merchant in the state, notwithstanding the declared policy of the state to the contrary, to have possession of large stocks, thereby inducing credit, and to cover them with secret liens, thereby deceiving creditors. It would, in effect, permit such merchant to pledge his entire stock without change of possession, without record of it, and without notice to the world. Such a scheme is disapproved by the law of the State of Illinois, which, in this instance, we are bound to uphold, however specious may be the device, or however attractive may be the form, by which it is cloaked. Such a scheme within the State of Illinois is constructively fraudulent as to creditors, and voidable by creditors."

That this statement is exceedingly conservative is apparent from a brief reference to the testimony.

Rodgers, the Bankrupt, testified that warrant number 9436 for 221 bags of buckwheat was received by him and delivered to Rogers & Brother under these circumstances: The Bankrupt had warrants pledged for two lots of buckwheat; he had three lots on his premises. He received an order, by sample, for two cars (or lots) and on May 6th, without having any release, he shipped out the lot covered by the Rogers receipt. On the next day he telephoned the Storage Company for a receipt for the remaining lot of buckwheat, and upon going to the Storage Company's office, received the warrant about 11 o'clock (Record, 211), and this was before the inspector of the Storage Company examined the property, as Rand, the inspector, was not at the Bankrupt's place till about 12 o'clock (Record, 193, 194). The Bankrupt then testifies (Record, 216, 217):

> "My way of doing business with the National Storage Company was just the same as in this case of the car of buckwheat. I would put the goods in store, would telephone my application, then go and get the warrant. That was not always done the same time of day before banking hours in the morning, sometimes it was done in the evening or in the afternoon. I would have this application made, but I would not make it. Sometimes I would telephone, and sometimes Vaas, the bookkeeper, would telephone, for the warrant. I would tell them I wanted to get warrants on certain lots of seed, so many bags, such a weight, located in such a section number, on a certain floor, and then they would go down and get them, and I would sign this application at the time that I telephoned. I had the blank applications, that yellow sheet there is it, and then after I had telephoned them I would fill out the blank application and sign it, and I think they came down for it when they made the examination, but I don't know that part of it. We got most of the warrants in the forenoon

before clearing. I always tried to get my deposit in at least fifteen minutes before 11. * * * *In other words, the National Storage Company took my word for the statement that there were certain bags of seed in a certain portion of the warehouse, then the inspector would go around any time and verify it, and I would get those warrants before any tags would be put upon the bags."*

Then under cross-examination he states, (Record, 223, 224):

"When I say, as I did on direct-examination, that I used the premises there the same since I made the lease to the National Storage Company as I did before, I don't know that I can answer any different from what I have. I used the floors. I rented them, and I used them. I don't mean to say that the Storage Company did not have any grain. They used those sections and issued warehouse receipts on the goods stored in different sections. By using the sections and issuing warehouse receipts by the Storage Company I mean I used them just the same all the time, from the time I got them until this thing occurred; there was not any difference that I know. The company had issued warehouse receipts on those goods in those different sections, and when I say I used them I mean with reference to the fact that those goods were in there on which the warehouse receipt had been issued. I mean to say I moved the stuff out from a section that was covered by a warehouse receipt to put my own property in there, that was not covered by a warehouse receipt. I don't mean to say that all the property I put in there in those different bins or sections was changed by me while the receipts were outstanding on them. Those that were not changed I did not interfere with, so that to that extent I did use the premises the same after this lease was made as I did before it was made. I used them the same all the time. When I say that I used them all the same all the time, I think I mean that if I wanted a warehouse receipt and there was not any goods in that space I put stuff there and asked for a warehouse re-

ceipt. *If I had a space there that I wanted to pile up a car of my own seed and issue my own warehouse receipt of it, I would do it when it was vacant.*

I took out seed on which warehouse receipts were issued without cancelling or having the receipts returned, and substituted other seed for it. It was not merely that I occasionally took seed and cleaned it and put it back, but I also took out seed on which warehouse receipts were out, and without changing those receipts took that seed and carried it away and brought back other seed in place of it without saying anything to the storage people about it."

Black, Rodgers' foreman, testifies as to the method of business, as follows (Record, 233, 234):

"It was part of my work while with Rodgers as foreman to attend to the storing and the weighing out and piling of this seed. When a carload of seed was brought in there to be piled up in storage, I would locate a vacant place and have it put there. When it was piled up it was cleaned and bagged. I have noticed those pasteboard tags of the National Storage Company that were placed on certain piles in the warehouse. Mr. Rand generally placed those tags on the piles there while I was foreman. The tags were kept in the office before they were used. I never in any instance placed the National Storage tags on original lots. I mean by original lots, the first time that a lot comes into the place. When the order would come to me from Rodgers' office to ship out any of those piles that had on them the tag of the National Storage Company, I would go to the car and ship it. It would be taken from a pile and transferred to the car. In case there was a National Storage tag on the lot I would take the tag off, and when Vaas was there give it to him. I could not state any particular instance where the tag was taken off by me. There were cases where this was done. When it was taken off I would keep the tag on my person or in the

> desk. In case the pile was not replaced at the time I would either tear it up or turn it in to the book-keeper. It is a fact that I tore up some of those tags in such cases. In cases where a pile having an actual storage tag thereon was thus shipped away and the pile was replaced by another lot, I would put the original tag right on that pile."

Black then gives a long list of cases showing memoranda kept for seed shipped out, with the marks and quantity and the word "Replace", and testifies that this was seed for which warrants were outstanding which was shipped out and afterwards replaced.

Vass, the Bankrupt's bookkeeper, testifies substantially to the same effect.

This testimony we refer to simply as illustrative. So far as it describes the manner in which the Bankrupt conducted business, it is uncontradicted; the position of Petitioners being that the storage company did not know that the business was so conducted. As the officers or employees of the warehousing company would probably be liable, under the law of Illinois, to imprisonment for not less than one year and not exceeding ten years for permitting acts of this character, it is not strange to find no such admission from them in the Record.

If visits were made to the Bankrupt's premises by the Storage Company's inspector as frequently as claimed, either those visits must have been of a most perfunctory character, or else the Storage Company's inspector was grossly negligent in not discovering the manner in which the business was being carried on.

Observe further, Rodgers kept on hand a lot of blank tags. (Record, 250.) Why should Rodgers have blank

tags of the Storage Company in his office, if these were intended to be placed by the Storage Company on the property after it had been receipted for by their inspector?

As to the signs and tags.

The signs were blue enameled tin signs, 3 in. by 7 in.

Black, the foreman, testifies as follows (Record, 243):

> "In reference to the tin signs, I examined the premises the morning of the last day that I testified. I visited all the floors. On the 8th of May there were bags actually piled before the six blue signs that I testified about the other day. Not before all of them, two or three. I could not say. There were six of these tin signs to my knowledge. They were, at a rough guess, fifteen or twenty feet from any window. If you were close enough you could read them, that is all. If you were five or six feet from them. If anybody stood at the door leading into the particular floor in which a tin sign was placed he could not read the tin sign from the door. There were no signs of the National Storage Company on the outside of the building, to my knowledge."

And again (Record, 246):

> "Saw six of these tin signs the last day I was up there. I said they couldn't be seen if there was a carload piled in front of them. They couldn't be seen standing on the gangway in front of the carload. Am sure of that. That would depend a good deal on the height of the man, he would have to be ten or twelve feet high to see them, because you couldn't see the tag over the pile. It is not a fact that the tin sign was put near the roof and above the pile of sacks. It was just in front, nearly on a level where the top of the pile of sacks comes to. Well, it may be that it was above the level of the pile of sacks. The pile of sacks in those sections was about seven feet high."

Rodgers, the Bankrupt, testifies these signs were so inconspicuous that he never saw them. (Record, 218, 224.)

Rand, the Storage Company's inspector, still in their employ, and who testifies in all respects as strongly as he can in favor of the company, says, (Record, 205):

> "I desire to make a correction in my testimony. I said yesterday or Saturday in the course of cross-examination, that if a person stood exactly in front of one of those piles he *might* be able to see the sign. I want to correct myself. I went out and found the signs cannot be seen from the front of the piles very readily—as well as they can a little further off, I mean the blue tin signs tacked on the wall."

The tags were but little larger than ordinary shipping tags, and but one tag was used for each warrant, that is, one tag on a pile of 250 to 500 bags. (Rand, Record, 177,185.) The total number of the Storage Company's warrants outstanding at the date of bankruptcy was about twenty, so that there would be but that many of these small tags on the entire seven floors (including basement) occupied by the Bankrupt. In considering these tags it should be remembered that the Bankrupt had his own tags on the bags of seed and also was issuing his own warehouse receipts. Under such circumstances the presence of a few tags would amount to nothing —certainly they could not effect a change of possession.

The lease to the Storage Company was made August 31, 1900. May 8, 1901, the bankruptcy petition was filed. The liabilities of the estate, according to the schedule, were $63,833.19. (Record, 332.) The assets, aside from the proceeds from the sales of seed claimed under these warrants, amount only to probably $6,000 or $7,000, out of which must be paid the expenses of the administration,

which in January, 1902, already amounted to $1500, not including compensation to the Trustee and counsel. (Record, 344.)

In *Union Trust Company vs. Trumbull,* 137 Illinois, 146, the receipts issued by the Storage Company involved in this case, but under less objectionable circumstances, were declared invalid by the Supreme Court of that state. In that case Hall & Company, who were merchants and factors in wool in Chicago, made leases to the Storage Company of certain floors of their warehouse. The Storage Company issued receipts which were pledged by Hall & Company, as collateral for loans. Hall & Company made a voluntary assignment for the benefit of creditors. The question of the validity of the receipts arose in a contest between this voluntary assignee and the holders of the receipts. The Court held the receipts invalid, saying:

> "Hall & Company retained the actual possession and control of their warehouse after the execution of the leases as before. The business of the Storage Company was under the immediate control of one Stephens, its secretary and manager, and he had three helpers and an office boy under him." * * *
>
> "The evidence shows that Stephens, or one of his helpers, visited the rooms of the warehouse as often as once or twice a week, during business hours, and looked around to satisfy themselves what wool was on hand, but they never assumed to take actual control of either of the rooms, or to interfere with Hall & Company's control and conduct of the warehouse in any respect." * * *
>
> "It is contended on behalf of the storage company, that signs were put up by the storage company in and about different parts of the warehouse, as its receipts

were issued, notifying the public that the storage company had possession; but the clear preponderance of the evidence is that such signs were not put up and kept up in such a way as to advise those dealing in the wool with the Halls, of any claim of possession on behalf of the storage company." * * *

"To the existence of a pledge, the possession, either actual or symbolical, by the pledgee, of the personal property which is the subject of the pledge, is absolutely essential. Ordinarily, actual and physical possession of the property is delivered to and retained by the pledgee; but where the actual delivery is to a carrier or warehouseman, and a bill of lading or warehouse receipt is given therefor, the assignment or transfer of such bill of lading, or indorsement of such warehouse receipt, with delivery thereof to the pledgee, is regarded in law as the delivery of possession to the pledgee of the property which the instrument represents, the bill of lading or receipt standing in the place of the property, of which it is the symbol. * * * But it is a necessary condition to the existence of such symbolical possession by the pledgee that the property itself is in the possession of some person or corporation other than the pledgor. Here the indorsements and transfers of the supposed warehouse receipts to the receipt holders were ineffectual to constitute them valid and legal pledges of the wool to secure the debts for which they were hypothecated, and this, *both because the National Storage Company did not have possession and control of the wool,* and because the wool mentioned in each receipt was not so set apart and distinguished from other wool as that it could have been found and identified by the receipt. The storage company was not, under the law, authorized to issue warehouse receipts.

This decision by the Supreme Court of the State, declaring the law in respect of such transactions, is, we submit, conclusive against the Petitioners in this case.

In *Bank vs. Jagode*, 186 Pa., 556, the case turned on the question of the validity of certain warehouse receipts, and Mr. Chief Justice Mitchell said:

"The substantial question is whether the receipt was in fact issued by a bona fide warehouseman.

The Act of September 24, 1866, P. L. (1867) 1363, makes a warehouse receipt negotiable to the extent that the person taking a transfer of it by indorsement and delivery is to be deemed the owner of the goods therein specified. By the general law governing such instruments this means that the transfer of the receipt is a constructive delivery of the goods. If therefore the receipt under which the plaintiff claims was a valid warehouse receipt within the statute the plaintiff's title must prevail, notwithstanding the good faith and priority of the appellant's actual possession.

But in order to have this effect, the requisites of the statute must be complied with, and plainly the first of these is that *there must be a receipt issued from a bona fide warehouse*. The act does not prescribe any form of receipt, and it is conceded that the one in controversy is sufficient in that respect. It purports to be issued by a warehouseman, and to be for goods held on storage and deliverable on the order of the depositor and the return of the receipt.

Nor does the act define a warehouse or a warehouseman, but uses the latter word in connection with "wharfinger or other person" (*ejusdem generis. Bucher vs. Com.*, 103 Pa., 528), in its ordinary signification of *one who carries on the business of receiving and keeping goods on storage* for the owners, for compensation. The act prohibits the issue of a receipt unless the goods shall have been actually received into store or upon the premises of the warehouseman; the issue of any second or duplicate receipt while the first is outstanding, without writing the word duplicate across the face of the second; the delivery of any goods receipted for except on surrender of the receipt; and the sale, incumbrance, etc., by the warehouseman of goods receipted for. These provisions plainly contemplate that the warehouseman shall be one engaged in the business, and also that he shall be another than the owner of the goods. A large part of the security of the holder of the receipt for the actual production of the goods when called for is the business interest and good faith of the ware-

houseman, and the penal consequences of any breach of duty to him. This security would be greatly diminished, if not rendered worthless, if any owner could choose to say his goods were on storage with himself and issue receipts which should pass from hand to hand for value, while the goods remained under his own control, or subject to levy by his creditors. * * *

"In the present case one Turtle issued the receipt in question, in sufficient form as already said, purporting to be from 'Turtle's Warehouses, 220, 222 and 224 Wood St.,' and plaintiff at the trial showed the issue of a number of similar receipts by Turtle, over a period of about two years; the negotiation of loans by several New York banks to the Keen-Sutterle Company, on these receipts; and the lease by Turtle of the premises on Wood street in his own name as a warehouse. * * * It appeared that Turtle, during all the time he was nominally keeping the warehouse and issuing receipts for goods on storage there, was a clerk in the employ of the Keen-Sutterle Company, at a salary; that the rent of the so-called warehouse was not paid by Turtle, but by the Keen-Sutterle Company or by F. W. Sutterle, one of the partners, and the rent due to Turtle from the sub-tenants of a part of the warehouse was not paid to him but to the Keen-Sutterle Company or F. W. Sutterle, and the only explanation given was that there was some private arrangement, not disclosed, between Turtle and Sutterle, on this subject; that no storage charges were paid by the Keen-Sutterle Company to Turtle on account of this warehouse, nor any credit given him on their books; that no persons other than the Keen-Sutterle Company deposited any goods in the so-called warehouse, though a few receipts were issued in the name of J. B. Moors & Company, under some arrangement with the Keen-Sutterle Company, which the learned judge declined to permit to be inquired into; and that Turtle had no sign on the warehouse to indicate his proprietorship, kept no books of the business except a book of blank receipts, had no office or even a desk in the warehouse, did not keep the key in his possession, was rarely there, and left the

whole charge, including the depositing and removal of goods, to the employees of the Keen-Sutterle Company. On these facts it is perfectly clear that there was no real warehouse at all in the case and that Turtle was a mere employee or man of straw used by the Keen-Sutterle Company to cover their own operations with their own goods. * * * *

"It is not a question of good faith, or even of diligence, on plaintiff's part, but of the possession of a good title by means of a valid and genuine receipt. This the plaintiff has failed to prove. *The paper given to it was not such a receipt, but a fraudulent imitation,* and the bank must, unfortunately for it, bear the loss."

In *Moors vs. Jagode,* 195 Pa., 163, a case quite similar to that last mentioned, Mr. Chief Justice Mitchell, in denying the validity of the warehouse receipts, says:

"Neither party being in any fault, the superiority of right must be determined by the strict legal title.

"This depends, as the learned referee correctly held, on the decisive question whether the wool was *in fact "stored"* with a warehouseman so as to bring the title of the holder of a receipt within the protection of the Act of September 24, 1866, P. L. (1867) 1363. This act is in derogation of the common law, and establishes an exception to the general course of business which is conducted on the presumption that title to personal property accompanies possession. To bring a case within the exception, therefore, all the requisites of the statute must be shown to exist. We had occasion to consider the act in *Bank vs. Jagode,* 186 Pa. 556, and it was there held that *the receipt must be one issued by a bona fide warehouseman,* and the mere holding himself out to the world or general repute is not sufficient if he is not such in fact."

In *American Pig Iron Storage Warrant Company vs. Sinnemahoning Iron & Coal Company,* 205 Pa., 403, the Iron Company leased to the Storage Company property adjacent

to its furnace, the Furnace Company fenced the property in, and the iron, as it came from the furnace, was piled in this yard and the Storage Company issued its receipts therefor. The contest was betwen the landlord of the Iron Company and the holders of the receipts. In sustaining the claim of the landlord, Mr. Justice Dean uses this significant language:

> "This act was obviously framed for the protection of the warrant holders and it is the duty of the courts to give full effect to its intent, but they cannot go further and by construction disregard or subvert the law which long settled the rights of a landlord to distrain for rent the goods on the demised premises. But for this act, there could be no question raised as to the right of the landlord to seize this iron made in the leased furnace from ore and coal mined on the leased land. It had been taken from the casting house and piled about the same distance from the furnace as it would have been, had there been no transfer to the storage company. *The warrant itself does not determine and fix that the iron has been warehoused; there must have been an actual change of possession; any other ruling would suggest a most fruitful method of fraud which is not warranted by any reasonable interpretation of the act.*"

The rule is well settled that, in the absence of statute specially authorizing it, receipts issued by the owner for property stored in his own warehouse are invalid, and this upon grounds of public policy.

Geilfuss vs. Corrigan, 95 Wis., 651.
Bank vs. Whitehead, 149 Indiana, 560.

The owner is not allowed to evade this rule by having a clerk or employee rent the warehouse and issue the receipts.

Bank vs. Jagode, 186 Pa., 556.

Under the facts here, how does the present case differ in reality from these cases? The owner stored the property,

cared for it and had the full control and dominion over it. The warehouse company rented to him its name for the issuing of receipts. In principle it seems to us the cases are precisely the same.

On the question of warehousing we state our position thus:

(1) The Storage Company had no *warehouse*, and the property purporting to be covered by its receipts was not *stored* with it.

(2) The Storage Company did not have any possession of the warehouse, nor did it have possession of the property claimed under these receipts.

All of the cases concur in holding that the court will look at the facts as they actually existed and will not be bound by the forms which the parties may have adopted.

The Storage Company had no warehouse. The lease to it was a pure fiction, and in fact fraudulent. It states that the leased premises are to be "used and occupied *exclusively* for the storage of personal property" by "said Storage Company as Warehousemen." The Storage Company paid no rent, the Bankrupt paid the rent. The party actually in the possession of the property—who had the real and beneficial possession and who exercised the real dominion and control over the premises—was the Bankrupt. He kept the keys. He could admit or exclude the Storage Company at his will. The proposition of the Storage Company to Rodgers was not to *store* property, but only "to *issue warehouse warrants* to the order of" the Bankrupt, upon property located upon *the premises of the Bankrupt.* For this it was to be paid

not for *storage,* but in proportion to the *value* of the property covered by the receipts.

The Bankrupt received the property, placed it upon the premises as suited his convenience and when he desired a warrant he designated the property for which the warrant should be issued, and where that property should be located. The property continued in his care, under his custody and at his risk. The Storage Company assumed no responsibility whatever with respect to the care or custody of the property.

Under such circumstances is it not idle to contend that the property was *stored* with the Storage Company?

As to possession.

It is urged that the Storage Company was in possession of the property covered by its receipts. The contention is not as to the real and substantial possession but is purely technical. Possession implies dominion or control over the property. It implies the physical power to control the property and to dispose of it. In this case the Bankrupt had absolute and complete control over the property at all times *and in fact exercised it.*

It is argued by the Petitioners that the Storage Company had sufficient possession under the circumstances, and for this position a large number of cases are cited. A careful examination of these cases will show that they are readily distinguishable and fall within the following classes:

(1) Where the property had been placed in the possession of a third person and *beyond the control of the debtor.*

(2) Where the property, by reason of its bulky and ponderous character, or its situation, was *incapable* of actual delivery, and in this latter case the parties are required to do everything that, in view of the nature of the property and the circumstances surrounding the transaction, it is possible to do to make manifest publicly the change of possession.

These case therefore do not apply here, for these reasons:

(a) This case involves perishable property, easily handled and readily susceptible of delivery and actual possession.

(b) Even if complete physical possession of the property could be dispensed with, the Storage Company in no sufficient manner gave notice of its claim to the possession of the property as against the Bankrupt and his creditors.

The rule and the reasons for it are stated in *Gibson vs. Stevens*, 49 U. S. 384, one of the cases cited by the Petioners. In that case McQueen & McKay, on April 4th, 1850, purchased pork and flour then in the warehouse of the vendors at Fort Wayne, Indiana, to be delivered to the vendees by canal at Toledo, Ohio, receiving a memorandum of the sale and a receipt for the purchase money and an engagement to deliver the merchandise on board canal boats soon after the opening of canal navigation; and these documents McQueen & McKay pledged with Gibson as security for loans, on April 17th. On April 27th the property was seized on an attachment. After holding that under the circumstances of the case the transfer of these papers amounted to a symbolical delivery of the properties, Mr. Chief Justice Taney says:

> "The rule is not confined to the usages of any particular commerce but applies to every case where the thing sold is from its character or situation at the time *incapable* of actual delivery. The contract between the

> plaintiff and McQueen & McKay having been made in NewYork, the articles in the warehouses at Fort Wayne *were incapable of actual delivery;* consequently the delivery of the evidences of title with the order to the bailees endorsed on them passed the title and possession to the plaintiff."

It will be observed that this was the case of a *sale,* and the decision is put upon the ground that under the circumstances actual delivery could not be made, and that the reasonable time within which the vendee should *remove* the articles was to be determined upon a view of all the circumstances.

The further qualification of the rule is also pointedly stated in *Clow vs. Woods,* 5 Sergeant & Rawle (Pa.) 275. In that case a tanner executed a mortgage on certain personal property to secure two creditors. The mortgage was not recorded, and the property remained in the possession of the tanner under an agreement with the mortgagees that he should finish the process of manufacture, and for that purpose use the tools and bark. The property was levied on by creditors, the Court held the mortgage invalid, and in the opinion, Mr. Chief Justice Gibson states the rule applicable to cases where possession *cannot* be delivered, thus:

> "But where, from the nature of the transaction, possession cannot be given, the parties ought in lieu, to do everything in their power to secure the public from that deception which the possession of property without the ownership always enables a person to practice. When a ship at sea is sold, the brand bill of sale is delivered, and that divests the vendor of his last badge of ownership and when goods are too bulky to admit of manual possession, the key of the room is handed over. In every case where possession is not given, the parties must leave *nothing* unperformed, within the compass of their power, to secure third persons from the consequences of the apparent ownership of the ven-

> dor. * * * In a case of this kind, the ***slightest*** neglect in *any* circumstance *the nature of the case may admit* of as an *equivalent* for actual possession, is *unpardonable.*"

The question was very fully considered by this Court in *Casey vs. Cavaroc,* 96 U. S., 467, one of the Credit Mobilier cases, where in discussing the validity of a pledge of collateral securities, Mr. Justice Bradley says:

> "The possession need not be actual, it may be constructive; as where the key of a warehouse containing the goods pledged is delivered, or a bill of lading is assigned. In such case, the act done will be considered as a token, standing for actual delivery of the goods. *It puts the property under the power and control of the creditor.*"

Again in the same case, after reviewing cases under the civil law, he proceeds:

> "Troplong deduces, from these and other cases, the general conclusion that, whenever the assistance of the debtor is necessary to the better accomplishment of the object of the pledge, it ought to be permitted, provided always that it does not disturb the possession of the creditor in any respect. *Nant.,* No. 313. Dalloz says: 'It is evident that if the pledge of movables could, without a delivery, have effect in regard to third persons, it would be the source of great frauds and deceptions. When the debtor is obliged to surrender possession, he cannot deceive third parties dealing with him by keeping possession of the pledged articles as part of his estate, and getting credit thereby.' He takes special notice of the decision that a pledge is not valid if the dispossession of the debtor is not sufficiently complete to *prevent* substitution; or if there is a mere contract for a pledge, and not an actual pledge. Dalloz, *Rep. Nant.,* 119. And he lays down the principle that, though a contract for a pledge may be enforced against the pledger and his heirs, *Nant.,* No. 121, yet that, by the very words of the Code, he cannot set up the privilege

of the pledge, which alone constitutes his right as against third persons, without actual possession or its equivalent."

In *Moors vs. Reading*, 167 Mass., 322, Houdlette, a dealer in iron, carrying a stock of goods in his store in Boston, borrowed money from the plaintiffs and executed to them a general collateral agreement setting forth that all the merchandise transferred or to be transfererd by him to them should be held only as security for present or future indebtedness. Houdlette executed to the plaintiffs from time to time bills of sale for goods in his store which were intended to cover all of the stock of goods in the store. Soon after the date of each bill of sale the plaintiffs took possession, by going to the store, formally receiving possession of the goods, and appointing Houdlette's book-keeper as the plaintiffs' agent, and as sales would be made written orders would be given to the book-keeper to release or surrender portions of the goods included in the bills of sale. The book-keeper was paid by Houdlette. In holding that the plaintiffs were not entitled in replevin to recover the property as against Houdlette's assignee, the Court, by Mr. Justice Allen, said:

"If it be assumed that there was from time to time a sufficient taking of possession by the plaintiffs at the outset, the facts effectually negative the plaintiffs' view that there was any such retention of possession by them as to meet the requirements of the law. The obvious purpose of the statutory provision as to unrecorded mortgages, and of the rule of law as to the retention of possession by pledgees, is to prevent mortgagors or pledgors, by means of their possession of the property, from misleading people into the belief that they are its real owners. Accordingly the rule is general that, if mortgagors whose mortgages are unrecorded, and pledgors, are allowed to remain in possession of the mortgaged or pledged property, the mortgagees or pledgees will lose their lien."

In *Drury vs. Moors,* 171 Mass., 252, Houdlette, an iron and steel merchant, having a store at the corner of Franklin and Hamilton streets in Boston, leased a lot on High street at some distance from his warehouse, which lot was enclosed partly by the walls of an adjoining building and partly by a fence with gates. The key to one of the gates was kept in Houdlette's store over the desk of his book-keeper, Garrett, who acted as the representative of the defendants. Houdlette made bills of sale for portions of the iron in this store to the defendant as security for money loaned, receiving the bills of sale endorsed with a memorandum of delivery. After the insolvency the key was delivered to the defendants. The Court held that there was no sufficient delivery of possession to constitute a valid pledge, and after referring to the case of *Moors vs. Reading, supra,* Mr. Justice Holmes, delivering the opinion, said:

> "The additional facts (are) that the goods were under lock and key in Houdlette's private enclosure and that the only key known, so far as appears, was in Houdlette's possession. The testimony is that the key was kept in Houdlette's office over the desk of Garrett, the book-keeper, whom Moors had made his agent to keep possession of the property, but it nowhere is suggested that he held this key adversely to Houdlette, or that he had any such relation to it that he could have sued for it if it had been carried off."

In *American Pig Iron Storage Warrant Company vs. German,* 126 Ala., 239, a case cited by the Petitioners, the rule is stated thus:

> "Notice to the public of the pledgor's interest in the property is sufficiently given by the possession which must reside in the pledgee. Such *possession,* however, to be effective either for notice or to give validity at law to the pledge *must* be *complete, unequivocal* and *exclusive* of the pledgor's possession in his own right."

In *Lilienthal vs. Ballou,* 125 Cal., 183, Phillips Brothers & Company, merchants, transferred a stock of merchandise to Trustees as security for the payment of claims of attaching creditors, under an agreement which provided that the managing partner should be continued at a salary, subject to the supervision of the Trustees who did not take personal possession, and the business was continued under the control of the same manager, and with the same employees as before, and the conspicuous signs of the partnership were allowed to remain, *with a small and less conspicuous sign added containing the names of the Trustees designated as successors to the firm. Held,* that there was no sufficient change of possession to prevent seizure of the property under attachment by another creditor upon the ground that public policy requires a real and substantial *delivery* and that possession be taken and retained.

Cases to the same effect might be multiplied, but these we think illustrate the application of the rule and its limitations.

Looking through all the forms under which the parties attempted to disguise the real transaction, it is manifest that the premises in question remained entirely in the possession of the Bankrupt; that he, and he alone, had the physical possession and control of them. The best that can be contended upon the part of the Warehousing Company is, that they had possession of the *premises* concurrently with him, and if their possession of the *premises* upon which the property was located was only concurrent with him, it is difficult to see how their possession of a part of the *property* upon those premises could rise higher.

Concurrent or joint possession does not satisfy the law in this respect; nothing but an exclusive possession satisfies it.

In *Massey vs. Allen*, 84 U. S., 351, this court had before it the question of the validity of a sale of household furniture under a bill of sale as against an assignee in bankruptcy. The parties to the transaction occupied the same house, and continued in the same relation after the sale as before. This court, by Mr. Justice Field, said:

> "The Statute of Frauds of Missouri declares that every sale, by a vendor, of goods and chattels in his possession or under his control, unless accompanied by delivery within a reasonable time, regard being had to the situation of the property, and followed by an actual and continued change of possession, shall be held to be fraudulent and void, as against the creditors of the vendor or subsequent purchasers in good faith. The sale of Downing to Mrs. Massey was, within the terms of the statute, fraudulent and void as against his creditors. It was not accompanied by any delivery of the property, and was not followed by any change of possession. The property consisted of furniture used in a house occupied jointly by himself and his vendee and her husband, and it remained in the same condition, and was used by all three precisely in the same manner after the sale as previously. There was no outward sign manifested, nor *indicia* exhibited, nor notice given, which could apprise the community of any change of ownership. The object of the statute is to prevent parties from being misled by apparent ownership of property where real ownership does not exist, but where a secret transfer has been made to another. This object would be defeated if a sale like the present one could be upheld. In the case of Claflin vs. Rosenburg, 42 Mo., 439, where the vendor had become the clerk of the purchaser, the Supreme Court of Missouri held that the possession which the purchaser was required to take of the property sold, in order to render the sale valid under the statute, must be open, notorious and un-

equivocal, such as would inform the public, or those who were accustomed to deal with the party, that the property had changed hands, and that the title had passed from the vendor to the purchaser; observing at the same time, that possession of this kind excluded the idea of a joint or concurrent possession with the vendor. The statute being a local one, applying only to sales in Missouri, this court will follow the construction given to it by the highest court of the State.

The assignee of Downing's estate was authorized, by the express terms of the 14th section of the Bankrupt Act (14 Stat. at L., 439), to pursue the property thus attempted to be transferred, and, as auxiliary to its recovery, to ask that the sale of the bankrupt be annulled."

It will be observed that in the above case the Statute of Missouri was no more than declaratory of the common law, and the requirement there that the change of possession must be open, notorious and unequivocal, applies equally to the present case.

In *Watson vs. Dealy*, 59 N. Y. Supp., 623, a landlady gave a mortgage on furniture in the house to a boarder, but continued thereafter to conduct the house and use the furniture. *Held* that there was no sufficient transfer of possession.

In *Babb vs. Clemson*, 10 Sergeant & Rawle, 419, where there was a contest as to certain farming property and household furniture as between the holder of a bill of sale and execution creditors, the Supreme Court of Pennsylvania, by Mr. Justice Duncan, said:

"There cannot be a concurrent possession in the assignor and assignee; it must be exclusive, or it is deemed colorable and fraudulent. To defeat the execution, there must have been a *bona fide, substantial change of possession.* It is mere mockery to put in another person to keep possession jointly with the former owner; a concurrent possession with the assignor is colorable."

The facts in this latter case were: Pusey made a bill of sale of the property to his sister-in-law, Elizabeth Clemson. The parties lived together in the same house, and for the most part the property and the use thereof continued the same after as prior to the making of the bill of sale.

Turning again to the opinion of this Court in *Casey vs. Cavaroc,* we call especial attention to the language, that

> "a pledge is not valid if the dispossession of the debtor is not sufficiently complete to *prevent* substitution."

In the present case it is conceded that the Bankrupt remained in such possession; that not only was he not *prevented* from making substitution, but was enabled at his will, at all times, to sell the property covered by the warrants and substitute other property for it, and in fact did so. It is rather alarming to find that so extensive were these substitutions that notwithstanding the difficulties placed in the path of the Trustee and the general creditors, they were able to show that as to at least five of the thirteen warrants held by the Bank, and as to at least three of the five warrants held by Rogers & Brother, the property covered by those warrants had been sold and removed and other property substituted in its place. Out of the eighteen warrants, eight are, by the decree of the Court, made to cover property substituted by the Bankrupt in place of the property originally covered by the warrants, and these substitutions were made, if not by the acquiescence or consent of the Storage Company, at least by its supine negligence.

If the possession were actually in the storage company their rights undoubtedly would not be lost by permitting the

owner from time to time to inspect the goods, or, acting subject to the Storage Company, to do such acts as might be necessary for their care; but it is quite different to turn this clear around so that the dominant possession is in the the owner and the storage company, as here, has a right of access from time to time only by permission of the owner.

We have considered the question of change of possession as though it were to be tested by the rule applicable in cases of sales or pledges, but such rule is too favorable to the Petitioners. In the case of sales, allowance has been made of a reasonable time under the circumstances for the purchaser to remove the property. This is particularly true of *Gibson vs. Stevens,* and is the point of decision in that case. In the case of pledges, regard has been had to the necessity for the care of the property, as in the case cited in *Casey vs. Cavaroc,* where the wine pledged was of such special quality that it was difficult to find any person other that the pledgor to care for it. But reasons of this kind have no application in determining the possession that is sufficient to constitute a *storing* of property in a warehouse, and the issuance of a valid warehouse receipt.

The purpose of a warehouse is to store property—to have and to keep the actual physical possession of the property. Until the warehouseman has that, he is not authorized to issue a receipt, and no other kind of possession is sufficient.

The Warehouse Statute of Illinois from which these receipts must derive their validity, provides:

> "Any warehouseman of any public warehouse who shall be guilty of issuing any warehouse receipt for any

> property not *actually* in *store* at the time of issuing such receipt, or who shall be guilty of issuing any warehouse receipt in any respect fraudulent in its character, either as to its date or the quantity, quality or *inspected* grade of such property * * * shall suffer, in addition to any other penalties prescribed by this Act, imprisonment in the penitentiary for not less than one and not more than ten years."

The character of the possession which the warehouseman must have is prescribed by the statute. The property must be *"actually* in *store"* before the receipt is issued, otherwise the offender shall suffer imprisonment of not less than one nor more than ten years in the penitentiary.

Apply the statute to this case. The property does not come within the class of bulky or ponderous articles. Those are not usually, if at all, stored in buildings, and they are incapable in the ordinary course of commerce, of manual delivery; but in the present case we are dealing with perishable property necessarily stored in a warehouse and readily susceptible of actual and complete delivery. The language of the Act is explicit. It would be difficult to make it more so—the property must be actually in store before the receipt issues. No other possession satisfies the language of the Act. In this case the Storage Company had no warehouse, did not offer to store, was not paid for storage and did not undertake any care or custody of the property. Whatever the rule might be, in other cases, manifestly so far as these receipts are concerned, the Petitioners have not brought them within the protection of the law.

Great stress is placed by counsel upon the necessity of the court sustaining the business of warehousing "presented by the method disclosed in this case," because of modern business requirements. Probably every scheme or business plan presented to this court and condemned by law, has been sought to be sustained by the argument of "the demands

of commerce" or "the requirements of modern business" or the "evolution of trade," and it should not be overlooked that no case is cited where any such "system of warehousing" as is shown in this case, has received the sanction of the courts.

So far as concerns this new system of warehousing which this court is now asked to approve, if this court will, as suggested by Petitioners' counsel, take judicial notice "that sundry like companies are engaged in the same kind of warehousing," we think it will also take notice of the fact that, not only are there the two cases pending in this court involving the validity of such warehouse receipts, but there are two other cases pending in the Circuit Court of Appeals for the Seventh Circuit, and also a case pending in the Eastern District of Tennessee, all involving like questions, all of them arising in bankruptcy cases, and in all of them the attempt being made to sweep away from the general creditors practically the entire estate by means of such receipts.

An apt illustration of what these companies seek to do, might be found in the case in Tennessee not yet reported referred to in the Petitioners' brief. In that case a car manufacturing company, having four large plants, made a lease of each of them to the warehouse company, thereafter continuing its business of manufacturing cars and car parts in the same manner as before. The only possession taken by the Storage Company was by tying tags upon piles of material and appointing a clerk of the Car Company at each plant as the custodian of the warehouse company at a salary of $2.50 per month. Bankruptcy resulted. It was found that practically none of the materials could be identified with the receipts, that the materials were constantly being used up and changing in the process of manufacture, and that the only attempt on the part of the Storage Company had been to keep the aggregate amount of materials of the various kinds at the plants, irrespective of location, equal to

the total amount of each kind for which warrants were outstanding. In other words, the entire plant in active operation became a warehouse, and the materials while passing through it were claimed to be validly covered by the outstanding receipts. These facts are of course not now before this court, and we mention them only by way of illustration and in reply to the suggestion of the Petitioners' counsel to which we have referred.

Our objection is not the fact that the warehousing company does not *own* its warehouse. It is that the companies engaging in this business do not pretend to *store* property, nor to take the custody, care or control of it. All that they do is *to issue warehouse receipts to assist the owner in borrowing money.* The business as conducted is not warehousing at all, but in fact the manufacture of collaterals. We have not yet reached that evolutionary—or in truth revolutionary—stage, where business conducted in the manner and under the circumstances disclosed here, has received the sanction of the courts.

What we do insist upon is, that the place where the property is located must be an *actual warehouse,* the property must be *stored* therein so as to be subject exclusively to the dominion and control of the warehouseman, and it must be beyond the power of the owner of the property to deal with it as his own. In the present case, if they had leased one or two of the floors of Rodgers' warehouse, separated in a substantial manner from the other floors, by doors, and the keys to the floors so rented, retained and kept by the Storage Company, so as to place it beyond Rodgers' powers to deal with the property as his own, no question as to the validity of the receipts would be raised. But this kind of warehousing is not intended for any such purpose. Its only object is to issue receipts upon the property, and the property must remain so located that the owner may conveniently use, or sell and dispose of it, the theory being that he will replace

it with an equal amount of like quality and value. For the risk in this respect—and for that only—the Storage Company is paid.

IV.

THE WAREHOUSE RECEIPTS BEING INVALID, AND NEITHER THE STORAGE COMPANY NOR THE BANK BEING IN ACTUAL POSSESSION OF THE PROPERTY, THERE WAS NO VALID PLEDGE.

In order to maintain a pledge, possession is essential. Neither of the Petitioners have any possession of the property claimed, except by virtue of the alleged warehouse receipts. If those receipts are valid, the endorsement of them transferred the title to the property covered by them, and carried with it constructive possession of the property. But if the receipts are invalid, then the case stands as though they did not exist. In other words, if the receipts are insufficient to pass title, then neither of the Petitioners have any possession of the property, and therefore have no valid pledge.

V.

UNDER THE BANKRUPTCY ACT THE PETITIONERS HAVE AS AGAINST THE TRUSTEE NO CLAIM TO, OR LIEN UPON, THE PROPERTY PURPORTING TO BE COVERED BY THE WAREHOUSE RECEIPTS.

The applicable provisions of the Bankruptcy Act are to be found in Sections 67 and 70.

Section 67 provides:

> "a. Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate.
>
> "b. Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate."

Clauses c, e and f, of Section 67, relate to preferences.

Section 70 provides:

> "a. The trustee of the estate of a bankrupt, upon his appointment and qualification, * * * shall be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all * * * (4) property transfered by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transfered or which *might* have been *levied upon and sold under judicial process* against him."

The Petitioners' position upon this point is that they are entitled to an equitable lien upon the property purporting to be covered by these warehouse receipts, which is superior to the rights of the trustee in bankruptcy.

The proposition on their part admits these facts:

(1) That the warehouse warrants are invalid, and their endorsement transferred no title whatsoever to the Petitioners.

(2) That neither the Storage Company nor the Petitioners had possession of the property covered by the receipts, and that the possession, control and disposition of the property covered by these receipts remained in the Bankrupt, with full power on his part to sell and dispose of the same and to substitute other property for it, and that in fact he did so sell and dispose of at least a large part of the property and substitute other property in lieu thereof.

It is conceded by the Petitioners' counsel, in the discussion of this question, that prior to the institution of the bankruptcy proceedings the property could have been levied upon and sold under judicial process against the Bankrupt or subjected to the claims of creditors by a creditors' bill; and this is clearly the law of Illinois:

Porter vs. Dement, 35 Ill., 478;
Cooper vs. Ray, 47 Ill., 53;
Atkinson vs. Foster, 134 Ill., 472.

Union Trust Company vs. Trumbull is relied upon as supporting the proposition that the Petitioners are entitled to an equitable lien, but in that case the lien was sustained solely upon the ground that the voluntary assignee for the creditors stood in the shoes of the debtor, and as against him the party loaning money in good faith had a superior equity.

The question then is, is the trustee in bankruptcy subject to the same disabilities as a voluntary assignee for creditors?

This question would seem to be answered in the most explicit manner by the sections we have quoted.

Section 67a provides that claims which for want of record "or for other reasons" would not have been valid as against "the claims of the creditors" shall not be liens against the estate.

Section 67b, which is not referred to in Petitioners' brief, is in this emphatic and significant language:

> "Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate."

Turning to Section 1 of the Act we find the word "creditor" is defined thus:

> "'Creditor' shall include anyone who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney or proxy."

So that independently of Section 70 it would be difficult to find language more precisely and explicitly conferring upon the Trustee the rights of creditors,—all creditors, judgment or otherwise,—than Congress has placed in 67b.

But this position is further emphasized in Section 70, where the Trustee is, by Clause 5, vested with title to property which, at the date of the filing of the petition, "might have been levied upon and sold under judicial process against" the bankrupt.

It is conceded that under the laws of Illinois, on May 7, 1901, the creditors of this Bankrupt could have levied upon and sold this property. How, then, in view of the provisions we have quoted, can it be said that the Bankruptcy Act evinces an intention to deprive the creditors of this right?

It is significant that the language most relied upon by Petitioners' counsel with reference to *bona fide* purchasers and *bona fide* transactions, does not occur in connection with the provisions which we have quoted. Those words are to be found in other parts of the Act, and with reference to other provisions.

The point we make now is that by the language of 67-a and 67-b, and Clause 5 of Section 70, the Trustee is explicitly invested with the rights which creditors would have had if the Bankruptcy Act had not intervened. The purpose of this provision cannot be better stated than it is put by Judge Jenkins in his opinion in this case, thus:

> "We are satisfied, from a careful scrutiny of the act, that the filing of the petition is something more than the dedication by the bankrupt of his property to the payment of his debts; that the trustee is not only invested with the title of the property, but, *since, after the filing of the petition the creditors are powerless to pursue and enforce their rights,* the trustee is vested with their rights of action with respect to all property of the bankrupt transferred by him or encumbered by him in fraud of his creditors, and may assail, in behalf of the creditors, all such transfers and encumbrances to the same extent that creditors could have done had no petition been filed."

In *Miller vs. Nugent,* 184 U. S., 1, this court by Mr. Chief Justice Fuller, said:

> "It is as true of the present law, as it was of that of 1867, that the filing of the petition is a *caveat* to all the world, and in effect an *attachment* and injunction."

In *Casey vs. Cavaroc,* 96 U. S., 467, already referred to, Mr. Justice Bradley says:

> "Indeed it may be laid down as a general rule, as well at the common law as the civil law, that a trustee, assignee or syndic, having the powers and occupying the relations which are sustained by a receiver under the National Banking Act, or an assignee in bankruptcy, may well oppose any privilege or preference which the law itself, unaided by a *bona fide* purchase or judgment, would regard as void against the general creditors in a direct contest between them and the parties claiming such privilege or preference; even though the debtor

himself, on account of some personal disability arising from his own acts or engagements, could not resist the claim. That an assignee in bankruptcy has this power can not well be doubted; and since a national bank can not be put into bankruptcy, but can only be wound up under the peculiar provisions of the Banking Act, the receiver appointed by virtue thereof must have the same power; or the absurd consequence would follow, that the property of a bank disposed of by voluntary conveyances, or pledges not good as to third persons, would be beyond the reach of creditors.

"Where the legal or equitable property in a security passes, and there is no express law invalidating the transfer the creditor will be entitled to hold it as well against the assignee or receiver as against the debtor; because the assignee only takes such title as the debtor has at the time of the assignment or insolvency. In that case, however, the question of fraud would be admissible as a question of fact, to invalidate the transaction. But, in the present case, that question does not arise, or if it might be raised it is immaterial. The Credit Mobilier claims a privilege by virtue of a pledge: and such a privilege, as we have seen, can not be maintained as to third persons, without possession. Bad faith, it is true, would defeat the pledge though the creditor had possession. But want of possession is equally fatal, though the parties may have acted in good faith. Both are necessary to constitute a good pledge so as to raise a privilege against third persons. The requirement of possession is an inexorable rule of law, adopted to prevent fraud and deception; for, if the debtor remains in possession, the law presumes that those who deal with him do so on the faith of his being the unqualified owner of the goods."

Mr. Justice Bradley then proceeds to show that such a creditor has no equity over the general creditors entitling him to a claim of this kind, thus:

"This consideration meets the objection which is urged against the rule, that it would result in giving to

the general creditors the benefit of the advances made to the debtor on the faith of the stipulated pledge, inasmuch as the estate is increased to the extent of these advances. It is true that the estate is so increased; but the debts and liabilities are also increased to the same amount by the demand of the party who makes the advances, the only effect of the rule being, that the latter comes into concurrence with the other creditors on an equality, and not by way of preference; and if the latter derive any benefit from this result, it must be remembered that, in the view of the law, they might not have given credit to the common debtor had he not remained in possession of the goods, and appeared to continue as the absolute owner thereof. If the pledge should be sustained, they would have good cause to complain that they had been deceived by the acts of the parties setting up the pledge. So that, on the question of relative merit and demerit, the parties are in all respects equal. It is on this principle that the law is founded.

"These considerations also supply an answer to another suggestion, that equity will consider as done what the parties intended should be done, which it is assumed was, in this case, a transfer of the title of the securities. Equity will not exercise this power when it would injure third persons who have incurred detriment, and acquired consequent rights by the acts that are done. Such detriment has, in view of the law, been incurred in this case, and such rights have, by the express letter of the law, accrued."

In re Leigh, 96 Fed. 806, it is held that a chattel mortgage invalid for want of record, is void as against the Trustee in bankruptcy.

In re Howland, 109 Fed. 869, a contract for a conditional sale was invalid as to creditors and that the property passed to the Trustee, Judge Coxe, saying:

"The merchandise in question therefore passed to the Trustee pursuant to the provisions of Bankruptcy Act, sec. 70 (5) as the property 'which might have been

> levied upon and sold under judicial process against the bankrupt.' Neither this section nor section 67a, which is also in point, is found in the Act of 1867."

In re Garcewich, 115 Fed. 87, the Circuit Court of Appeals for the Second Circuit, held that where a conditional sale was void because it permitted the bankrupt to use or sell the property, the Trustee was entitled to hold the property as against the vendor.

In re Tweed, 131 Fed. 355, a conditional sale void against creditors for want of record and acknowledgment,—*Held*, that the Trustee took title to the property.

In re Butterwich, 131 Fed. 371, a case of an attempted conditional sale, Judge Archibald says:

> "By section 70 of the Bankruptcy Act, the Trustee is vested by operation of law with the title of the bankrupt as of the date when he was adjudged a bankrupt to all '(5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him.' That is to say, the Trustee does not stand simply in the shoes of the bankrupt, but is invested with the rights of his execution creditors and the question in the present instance therefore, is whether the show-cases which are sought to be reclaimed could have been successfully subjected while in the hands of the bankrupt to levy and sale upon execution against him. This is to be determined by the local law with regard to which as applied to this case there can be no doubt".

In re Mullen, 101 Fed. 413, was a petition by the Trustee seeking to recover real estate in the possession of a vendee of the vendee of the bankrupt, and in discussion the construction of the Act, Judge Lowell says:

> "I am inclined to think that section 70e was intended to provide simply that the trustee in bankruptcy should

have the same right to avoid conveyances as was possessed by creditors, and this with especial reference to the statute of 13 Eliz. and similar statutes of the several states. Section 70e was not intended to define what conveyances creditors of the bankrupt might avoid, or to distinguish, in the respect of such conveyances, between the rights of the creditors taken together and the rights of a trustee in bankruptcy, but only to give to the trustee such rights as the creditors, or any of them, possessed. In Low. Bankr., p. 513, it is said to add nothing to the comomn law. The Statute of 13 Eliz. makes void, as against creditors, conveyances in fraud of creditors, but provides that the operation of the statute shall not extend to any estate conveyed upon good consideration and bona fide. In inserting a like exception in section 70e, I think congress meant substantially to re-enact the exception placed in the Statute of Elizabeth, and not to give to bona fide purchasers for value greater or less rights than those which that statute gives them. The reference to bona fide purchasers in section 70e should therefore receive the same construction that a like reference has received in the statute of 13 Eliz. and its American substitutes."

In re New York Economical Printing Company, 110 Fed. 514, and *in re Kellogg*, 118 Fed. 1017, which latter case came to this Court as *Hewitt vs. Berlin Machine Works*, 194 U. S. 296 are clearly distinguished in the opinion of this Court. In the *Berlin* case the machines were sold under a conditional contract valid under the laws of the State of New York, save only as against subsequent purchasers, pledgees or mortgagees in good faith; that is they were valid and binding as against all creditors. For this reason the Court held that the trustee's title was not superior to the title of the vendor, and in delivering the opinion of the Court in this case Mr. Chief Justice Fuller quotes from *re Economical Printing Company*, thus:

"The present act like all preceding bankruptcy acts contemplates that a lien good at that time (the date of

the petition) as against the debtor *and as against all of his creditors, shall remain undisturbed.* If it is one which has been obtained in contravention of some provision of the act, which is fraudulent as to creditors, or invalid as to creditors for want of record, it is invalid as to the Trustee."

The opinion then proceeds thus:

"We concur in this view which is sustained by decisions under previous bankruptcy laws (citing cases), and is not shaken by a different result in cases arising in states by whose laws conditional sales are void as against creditors. In our opinion, these machines were not, prior to the filing of the petition, property which under the law of New York, might have been levied upon and sold under judicial process against the bankrupt; nor could she have transferred it within the intent and meaning of section 70a."

In re Tweed, 131 Fed. 355, and *in re Butterwick,* 131 Fed., 371, both follow and apply this construction of the Bankruptcy Act.

The two clauses so much relied upon by Petitioners' counsel in this connection, are 67-e and 70-e.

Clause 67-e relates entirely to preferences, that is, transfers or encumbrances within four months prior to the filing of the petition, while Clause 70-e is the general authority to the trustee to avoid any "*transfer* by the bankrupt of his property which any creditor might have avoided", and to recover such property save as to "a *bona fide* holder for value." It should be observed, that the words "*bona fide* holder for value" are not used in connection with the powers of the trustee to which we have already referred.

These provisions afford no protection to the present Petitioners for these reasons:

(1) The Petitioners under the proposition we are now discussing, do not claim under any *transfer,* but are asserting only an equitable lien. It is not a proceeding by the Trustee to avoid a *transfer,* but the creditor is the moving party and asserts a claim to an *equitable lien* against the assets in the hands of a Trustee.

The warehouse receipts were invalid, the endorsement thereof did not transfer the *property* in the seed, and the Petitioners having no *possession* of the property, they do not come within the provisions of the Act.

The construction of these clauses is fully discussed by Judge Lowell, in the case *In re Mullen,* 101 Fed., 413.

(2) The meaning of the term *"bona fide* purchasers for value" is well settled, and the doctrine does not protect the holder of a mere equity. It applies to and protects only the purchaser of a legal estate or title. It has no application therefore, in favor of a party who has neither title nor possession and claims only an equitable lien.

Hallet vs. Collins, 10 Howard, 174.
Vattier vs. Hinde, 7 Peters, 271.

(3) The protection given by the Bankruptcy Act to *bona fide* holders, or purchasers, for value, is no greater than that already given to such holders or purchasers by the courts in construing the Statute of 13 Elizabeth and the American Statutes re-enacting that Act or founded thereon; and such protection does not extend to transactions invalid as against creditors.

In re Mullen, 101 Fed., 413.

The policy of the Bankruptcy Act, as it seems to us, also strongly supports our position. It is the policy of that Act to produce equality of distribution; and for this purpose the bankruptcy proceeding is in effect an attachment of the property and an injunction against the creditors from taking

further proceedings for the assertion of their rights. Therefore, the parties being restrained by the bankruptcy proceedings from the assertion of their rights, full authority is vested in the Trustee to assert the rights which, by reason of the proceedings, the creditors are prevented from enforcing, so that an equal and proper distribution of the assets of the estate can be made. To hold that the Act does not confer upon the Trustee this power, would prevent the accomplishment of one of its most essential objects.

Again, to sustain this claim of an equitable lien, the burden was on the petitioners to show that the specific property purporting to be covered by the receipts held by them, was in the possession of the Trustee. Not only did they not do this, but the record shows that at least as to eight of the eighteen receipts the property now in the possession of the Trustee was substituted by the bankrupt in place of that originally covered by the receipt. That this is fatal as against the existence of such lien, is shown in the brief heretofore filed.

We submit that the decree of the Circuit Court of Appeals should be affirmed.

JAMES H. REED,
JAMES H. BEAL,
Of Counsel for Respondents, the Chicago Title & Trust Company, Trustee, and James A. Patten.

JOSEPH E. PADEN,
NEWTON WYETH,
REED, SMITH, SHAW & BEAL,
Of Counsel.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1904.

No. 139.

THE FIRST NATIONAL BANK OF CHICAGO, H. W. ROGERS and JAMES C. ROGERS, as H. W. ROGERS & BROTHER, *Petitioners,*

vs.

THE CHICAGO TITLE & TRUST COMPANY, Trustee of ALEXANDER RODGERS, Bankrupt, THE NATIONAL STORAGE COMPANY, JAMES A. PATTEN, FRANK E. WINANS, and E. W. BAILEY & COMPANY, *Respondents.*

CERTIORARI.

To Messrs. Henry S. Robbins, Wallace Heckman and James G. Elsdon, Counsel for Petitioners:

PLEASE TAKE NOTICE, that on this 11th day of February, 1905, these respondents forwarded to the clerk of the Supreme Court the following citation,

with request to file or bring the same to the attention of the court, as may be done.

Respectfully,

JOSEPH E. PADEN and
NEWTON WYETH,
Counsel for Respondents, the Chicago Title & Trust Company, Trustee, and James A. Patten.

I hereby certify that I caused copies of the foregoing notice and the following citation to be delivered to the said counsel for petitioners, this 11th day of February, 1905. NEWTON WYETH.

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vs.

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CERTIORARI.

Counsel for respondents, The Chicago Title & Trust Company, trustee, and James A. Patten, beg to cite to the court in this cause the following case from the Eighth Circuit:

Dodge v. *Norlin*, 133 Fed. Rep., 363 ("Advance Sheets," Feb. 2, 1905).

Respectfully submitted.

JOSEPH E. PADEN, and
NEWTON WYETH,
Counsel for Respondents, Chicago Title & Trust Company, Trustee, and James A. Patten.